APPENDIX A.

Opinion of Court of Appeals.

United States Court of Appeals
For the Eighth Circuit.

No. 18,805.

Robert Bolivar DePugh,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 15, 1968.]

Before Van Oosterhout, Chief Judge; Mehaffy and Heaney, Circuit Judges.

Per Curiam.

On January 31, 1967, defendant Robert Bolivar DePugh was sentenced upon his plea of *nolo contendere* to a one-count indictment alleging a violation of 15 U. S. C. A., § 902 (e), charging that he transported a revolver in interstate commerce while under state indictment for a crime punishable by imprisonment for a term exceeding one year.[1]

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[1] 15 U. S. C. A., § 902 (e):

"It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugutive (sic) from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

This appeal arises from the March 8, 1967 orders of the district court overruling defendant's timely motions for new trial and in arrest of judgment. We affirm the judgment of conviction.

Defendant's various arguments raise the sole issue of the sufficiency of the federal indictment. This court is not foreclosed by a plea of *nolo contendere* from considering the sufficiency of the indictment. *Melrose Distillers, Inc. v. United States,* 258 F. 2d 726 (4th Cir. 1958). See also *Jaban v. United States,* 333 F. 2d 535 (8th Cir. 1964). The defendant argues that § 902 (e), under which he was indicted by the federal grand jury, requires a valid and legal predicating indictment as one of its elements; that the state indictment returned on August 16, 1965, and quashed on March 9, 1967, was defective; that it was null and void as it failed to allege possession of a bomb with intent to use it unlawfully against the person or property of another, an alleged essential ingredient of the Missouri statute.[2] This argument was first raised in the defendant's pretrial motion to dismiss the indictment which was overruled by District Judge Elmo B. Hunter in a memorandum and order dated January 27, 1967 and reported as *United States v. DePugh,* 266 F. Supp. 453 (W. D. Mo. 1967).

The state indictment pending at the time of defendant's sentence in federal court, omitting its formal parts, reads as follows:

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[2] V. A. M. S., § 564.580:

"Possession or Control of Bomb Prohibited—Penalty

"Every person who has in his possession or under his control a bomb or bombshell, or who carries or possesses any explosive substance with intent to use the same unlawfully against the person or property of another, is guilty of a felony, and upon conviction therefor, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than ten years. . . . provided, that this section shall not apply to the lawful possession of bombs or bombshells by peace officers or by members of military forces in the regular discharge of their duties as such."

"The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson, being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on or about the 9th day of July, 1965, one ROBERT B. DEPUGH, whose more true and full name is unknown to the members of the Grand Jury, did then and there unlawfully, wilfully and feloniously have in his possession and under his control various bombs and bomb shells; against the peace and dignity of the State."

The state indictment was predicated on V. A. M. S., § 564.580, and although not in the language of the statute did charge that the defendant "unlawfully, wilfully and feloniously" had in his possession and under his control various bombs and bombshells. The experienced district judge was of the opinion that the indictment was proper and valid on its face.[3] However, on March 9, 1967, some thirty-seven days after sentencing on the federal plea, the state court quashed the indictment on motion of defendant.

The record before us does not show whether at that late date the state prosecutor resisted the motion to quash the state indictment, but under Missouri law a substitute information could have been filed if the state indictment was insufficient either as to form or substance. The Missouri statute, V. A. M. S., § 545.300 provides:

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[3] "The state indictment appears to be proper and valid on its face. It charges a state felony. One and one-half years after it was returned it has not been held invalid. The state indictment charges a violation of section 564.580, R. S. Mo. 1959 which reads in part: 'Every person who has under his control a bomb or bombshell, * * * is guilty of a felony * * * (punishable) by imprisonment in the penitentiary for a term not less than two nor more than ten years.'" *United States v. DePugh*, 266 F. Supp. 453, 455, n. 2 (W. D. Mo. 1967).

"§ 545.300. Informations—amendment—substitution for defective indictment.

"An information may be amended either as to form or substance at any time before the jury is sworn, but no such amendment shall be allowed as would operate to charge an offense different from that charged or attempted to be charged in the original information. *If an indictment be held to be insufficient either as to form or substance, an information charging the same offense charged or attempted to be charged in such indictment may be substituted therefor at any time before the jury is sworn.* No amendment of the information or substitution of an information for an indictment as herein provided shall cause a delay of the trial unless the defendant shall satisfy the court that such amendment or substitution has made it necessary that he have additional time in which to prepare his defense." (Emphasis added.)

We think this statute is a complete refutation of defendant's contention for reversal, which is based on the asserted invalidity of the state indictment. The state indictment returned against defendant on August 16, 1965 carries a minimum sentence of two years. This indictment was pending when defendant was alleged to have transported the revolver from Des Moines, Iowa to Kansas City, Missouri, in interstate commerce between the dates of July 23, 1966 and August 20, 1966. The state indictment was pending when defendant entered his plea of *nolo contendere* and was sentenced to the custody of the Attorney General for a term of one year on January 31, 1967 in the district court. It was not until March 9, 1967 that the state indictment was quashed. Defendant had by this time been convicted in the present case, and also on January 17, 1967 he had been convicted and sentenced upon three counts of an indictment by trial to a jury in the same federal district court. When the state indictment was

quashed, the prosecutor could have filed a substitute information to correct any defects in the indictment if he wished. We have no knowledge why the state did not substitute an information and prosecute the defendant when the indictment was quashed. The indictment pended for about fifteen months and no state action was taken. It could well have been that the state's inactivity was by reason of its knowledge of some of the federal charges as it is not uncommon for state charges to be sometimes dropped when the same defendant has been convicted or sentenced under a federal charge. Whatever the motivation, it could not have had any effect upon the validity of the federal indictment. The United States was not a party to the state proceeding and could not take any action to support the validity of the state indictment, and therefore could not be affected by the decision of the Missouri court to which it was not a party. *United States v. Luros*, 243 F. Supp. 160 (N. D. Iowa, 1965).

We assume for purposes of this decision that the state indictment was defective, but at most it was voidable and not void because of the Missouri statute permitting substitution of an information to cure the defects. We have heretofore held in *Schook v. United States*, 337 F. 2d 563, 567 (8th Cir. 1964), that the federal Act applied to informations as well as indictments and that:

> "Congress plainly sought to protect the public by proscribing the transportation of firearms by convicted felons or those charged with felonies without attaching any significance to the procedural vehicle forming the basis of the charge. It would therefore emasculate Congress' purpose for us to distinguish between persons lawfully charged with a felony by 'information' and those charged by 'indictment.'"

There does not appear to be any reported case precisely in point challenging a conviction under federal indictment which is based on a state indictment that is subsequently

quashed. Common sense, however, dictates that federal law enforcement should not hinge on the outcome of a state charge, whether by acquittal, nolle prosequi or quashing of the indictment. If such were the law, the federal government would have to await the state trial and any appeals that might follow before federal law enforcement could be attempted. Such frustration of the federal legal processes finds no support in law or common sense. The court stated in *United States v. Luros, supra* at 168:

> "The United States was not a party to the California prosecution, and its power to enforce its criminal laws cannot be affected by the decision of a state court in a case to which it was not a party."

Our view is that the rationale in *Goodwin v. United States,* 185 F. 2d 411 (8th Cir. 1950), is applicable here.[4] Defendant in *Goodwin* was convicted in the federal district court of escaping from jail while being held to answer an indictment in a federal district court in Florida which was later dismissed. This court held that the subsequent dismissal of the Florida indictment did not affect the validity of the conviction for escape. See also and compare *United States v. Sutton,* 363 F. 2d 845 (4th Cir. 1966), cert. denied, 385 U. S. 1014 (1967), where it was held that defendant's conviction of interstate transportation of falsely made securities was not barred by an acquittal in the state court of charges of having stolen and received the same securities.

The trend for many years has been to simplify procedure, particularly with respect to language used in indictments to further the ends of justice. Under Missouri law the state indictment was not void *ab initio,* but only voidable, since the indictment could have been corrected

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[4] See also and compare the later case of *Boydston v. Wilson,* 365 F. 2d 238 (9th Cir. 1966).

by substituting an information, if necessary. As long as the indictment was pending in state court, violation of the federal statute by defendant subjected him to the indictment and conviction from which he appeals. All of the elements of the federal crime were included in the federal indictment since the state indictment was pending at the *time of the* federal indictment.

Section 902 (e) is a part of the "Federal Firearms Act." Its adopted purpose was aptly stated by the court in *Cases v. United States,* 131 F. 2d 916, 921 (1st Cir. 1942), cert. denied, as *Velazquez v. United States,* 319 U. S. 770 (1942):

> "In the Act Congress sought to protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities, and certainly no one can seriously contend that the test of unfitness which Congress established is irrelevant to this purpose."

The Missouri indictment fully apprised defendant of the state charge as therein described and to predicate a reversal of the federal conviction on inept draftsmanship or failure to substitute a more detailed averment of intent in an information, or for any subsequent disposition resulting from the state charge, would, in our view, constitute a miscarriage of justice.

We note that the sentence in this case of one year was made to run concurrently with sentences imposed in Counts I and II in case No. 18,732, presently pending in this court. The sentencing court also provided that in the event of the "overturning" of case No. 18,732, the sentence in this case was to commence when "that fact is known."

The judgment of conviction is affirmed.

APPENDIX B.

Judgment.

(Filed Apr. 15, 1968, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

No. 18,805. September Term, 1967.

Robert Bolivar DePugh,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 15, 1968.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
For the Eighth Circuit.

APPENDIX C.

District Court Opinion Reported as United States v. DePugh, 266 F. Supp. 453 (W. D. Mo. 1967).

In the United States District Court for the Western District of Missouri, Western Division.

United States of America,
Plaintiff,
vs.
Robert Bolivar DePugh,
Defendant.
} 22288.

MEMORANDUM AND ORDER.

(Filed Jan. 27, 1967.)

Defendant Robert Bolivar DePugh has filed a motion to dismiss alleging that the indictment (1) does not state facts sufficient to constitute an offense against the United States; (2) is based on a statutory section (Title 15, Section 902 (e) U. S. C.) that is unconstitutional by denying equal protection of the laws and stripping defendant of his "presumption of innocence until proven guilty beyond a reasonable doubt" to the charge pending in the Jackson County, Missouri Circuit Court; and (3) that the indictment in this Court is invalid because it is based on an invalid state indictment that is under attack.

Defendant did not wish an evidentiary hearing on his motion but relied on his contentions as presenting legal questions only.

Neither the motion nor the accompanying brief undertakes to illuminate defendant's contention that the indictment does not state sufficient facts. The Federal Fire-

arms Act (52 Stat. 1250; 15 U. S. C. 902 (e)) provides: "It shall be unlawful for any person who is under indictment . . . of a crime punishable by imprisonment for a term exceeding one year to ship, transport, or cause to be shipped and transported in interstate or foreign commerce any firearm or ammunition." The indictment clearly and plainly charges a violation of this section of the statute, and does state facts sufficient to constitute an offense against the United States. See, Downing v. United States, 348 F. 2d 594 (5th Cir. 1965), cert. den., 382 U. S. 901. Schook v. United States, 337 F. 2d 563, 567 (8th Cir. 1964); Willis v. United States, 289 F. 2d 581, 584 (8th Cir. 1961).

Defendant's second contention is that the statute is unconstitutional, viz, an unlawful classification thus denying equal protection. Congress in its wisdom has set up two classes of persons which it deems to be of such special risk to law and order as to be denied the right to carry firearms in interstate commerce. The first class is those who have been convicted of a felony. It appears to be well established that this is a lawful classification. Congress has as its second classification denied the right to those who are under indictment for an offense punishable by imprisonment for a term exceeding one year or who are fugitives from justice. Thus, by this statute, and its classification Congress has sought to protect the public by preventing the described transportation and possession of firearms and ammunition by those who, by their past conduct have demonstrated or indicated their unfitness to be entrusted with such dangerous instrumentalities. A person who is under indictment for alleged commission of a crime punishable by imprisonment for a term exceeding one year, or who is a fugitive from justice presents more than ordinary risk (even though he might later not be convicted of the offense charged) in transporting or possessing firearms. At least Congress must have so believed

as a basis of this classification[1] Grand jury procedure is established by law and is such as to minimize mistake or error. Grand jury indictments result only after careful consideration of evidence by the grand jurors. It is arguably not unreasonable to deprive a person of the right to carry in interstate commerce firearms while the indictment is pending. Schook v. United States, supra; Quinones v. United States, 161 F. 2d 79, cert. den., 331 U. S. 833, 67 S. Ct. 1513; Braswell v. United States, 224 F. 2d 706 (10th Cir. 1955).

This Court is governed by the fundamental rule of statutory construction that a presumption of validity attaches to an Act of Congress, and that such presumption is not lightly overcome. See, United States v. National Dairy Corp., 372 U. S. 29, 32 (1963), rehearing denied, 372 U. S. 961; McMahon v. City of Dubuque, Iowa, 255 F. 2d 154,

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[1] The legislative history of the Federal Firearms Act shows that it was designed to regulate the manufacture of and the shipment through interstate commerce of all firearms:

> "The committee has given much thought to coping with the firearms situation and to studying the best practicable means of combating it. It is believed that the bill above referred to will go far in the direction we are seeking and will eliminate the gun from the crooks' hands, while interfering as little as possible with the law-abiding citizen from whom protests have been received against any attempt to take from him his means of protection from the outlaws who have rendered living conditions unbearable in the past decade." Senate: S. Rept. 82, 75th Cong., 2 (1937).

When the 1961 Amendment to the Act was under consideration, the Senate Report contained the following statement:

> "Over the past few years the infiltration of racketeering into our society and the exploding crime rate have increasingly become a cause for national concern. New laws are needed to give the Federal Bureau of Investigation additional jurisdiction to assist local authorities in the common assault against Crime. S. 1750, introduced at the request of the Attorney General as an integral part of an anti-crime legislative program, would be such a law. Additionally, it would make it more difficult for the criminal elements of our society to obtain firearms." Senate: S. Rept. 364, 87th Cong., 2 (1961).

160 (8th Cir. 1958), cert. den., 358 U. S. 833. So long as a rationally sound basis exists for the congressional determination or classification, that determination is within the constitutional power of Congress. Eagan v. United States, 173 F. 2d 369, 375 (8th Cir. 1943), cert. den., 320 U. S. 788; Stutz v. Bureau of Narcotics, etc., 56 F. Supp. 810, 813 (N. D. Calif. 1944). It is a matter of legislative judgment. See, Kentucky Ship and Collar Co. v. Illinois Central Railroad Co., 299 U. S. 334 (1937).

Federal power to regulate interstate commerce in firearms by means of the Federal Firearms Act has been upheld many times since its enactment in 1938. See, Cases v. United States, 131 F. 2d 916 (1 Cir. 1942), cert. den., 319 U. S. 770, rehearing denied, 324 U. S. 889.

Defendant's third contention is that the indictment is invalid because it is based in part on an "invalid" state indictment that is under attack.[2] The crime charged in the indictment in this case was complete if a firearm was transported in interstate commerce while the transporter was under indictment. What may later occur to the state indictment, which on its face appears regular and charges a state felony involving maximum punishment of more than one year, is immaterial. This is clearly demonstrated by the Fugitive Felon Act which likewise involves the possibility that the fugitive who travels in interstate commerce to avoid prosecution for a felony may never in fact be prosecuted or found guilty upon such prosecution. The Courts have upheld the Fugitive Felon Act against constitutional attack of the instant nature. See Lupino v.

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[2] The state indictment appears to be proper and valid on its face. It charges a state felony. One and one-half years after it was returned it has not been held invalid. The state indictment charges a violation of section 564.580, R. S. Mo. 1959 which reads in part: "Every person who has under his control a bomb or bombshell, . . . is guilty of a felony . . . (punishable) by imprisonment for a term not less than two nor more than ten years."

United States, 268 F. 2d 799 (8th Cir. 1959); United States v. Brandenburg, 144 F. 2d 656 (3rd Cir. 1944); United States v. Miller, 17 F. Supp. 65 (W D. Ky. 1936); Azzone v. United States, 341 F. 2d 417 (8 Cir. 1965), cert. den., 381 U. S. 943; Hermans v. United States, 163 F. 2d 228 (6th Cir. 1947), cert. den., 322 U. S. 801, rehearing denied, 322 U. S. 821.

While the 8th Circuit Court of Appeals has never had the precise question before it, in considering other questions it has used language supporting the validity of the questioned provision of the statute. See, Schook v. United States, 337 F. 2d 563 (8th Cir. 1964) and cases there cited, especially Braswell v. United States, 224 F. 2d 706 (10 Cir. 1955). And see, Deckard v. United States, 260 F. Supp. 565 (E. D. Mo. 1966).

In summary, the motion of defendant to dismiss the indictment is found to be without merit and is overruled and denied.

Elmo B. Hunter,
Judge.

APPENDIX D.

In the Circuit Court of Jackson County, Missouri.

State of Missouri,
Plaintiff,
vs.
Robert Bolivar De Pugh,
Defendant.

No. C-34597.
Division 15-B.

Findings and Order Sustaining Defendant's Supplementary Motion to Dismiss Indictment and Quash Proceedings.

Now, on this 9th day of March, 1967, pursuant to Notice, the Court takes up the motion of defendant Robert Bolivar DePugh to dismiss indictment and quash proceedings.

The state is present by Mr. Joel Pelofsky, Assistant Prosecuting Attorney for Jackson County, Missouri, and the defendant is present by his attorneys, John Pohlmann and William Gilwee. Legal briefs of counsel were presented, considered, argued and heard; no evidence relating to the motion was presented by either party. The sole question for consideration is that presented by Paragraph 3 of defendant's motion, to-wit, whether the indictment found against the defendant, Robert Bolivar De Pugh, is set out with sufficient particularity to inform him of the offense with which he is charged.

The indictment undertakes to charge the defendant DePugh under Section 564.580, Revised Statutes of Missouri 1959. The relevant portions of that statutory section recite:

> "Every person who has in his possession or under his control a bomb or bombshell or who carries or

possesses any explosive substance *with intent to use the same unlawfully against the person or property of another,* is guilty of a felony, et cetera."

The indictment returned against the defendant recites:

". . . that at the County of Jackson and State of Missouri, on or about the 9th day of July, 1963, one Robert B. De Pugh, whose more true and full name is unknown to members of the Grand Jury, did then and there unlawfully, wilfully and feloniously, have in his possession and under his control various bombs and bombshells; . . ."

The indictment is signed by Alfred O. Hardy, then Assistant Prosecuting Attorney, and certified as a true bill under the signature of William M. Burke, Foreman. The indictment is fatally defective. It does not contain an essential element of the statutory offense, to-wit: "Intent to use the same unlawfully against the person or property of another."

The element of intent is a matter of substance and is required to be contained in the charge made against the person with definiteness and certainty.

A defendant's Constitutional right to understand the nature and cause of the action against him means that he must be definitely informed as to the nature of the charge so that he may prepare his defense and so that the proceedings, when determined, will constitute a complete bar to another prosecution for the same offense. Article 1, Secs. 18, 19, Constitution of Missouri, 1945, VAMS; *State v. Harris, 313 S. W. 2d 664.* The authorities sustaining this requirement are too numerous and too universely acknowledged to require further recitation of them.

Where a statute, such as Section 564.580, R. S. Mo. 1959, makes a particular intention essential, it is necessary to allege the intent with directness and precision. The stat-

utory section under the sanction of which the indictment was returned specifically requires that the possession or control of a bomb or bombshell be coupled with the intent to use the same unlawfully against the person or property of another in order that a violation of the law be established. The element of intent was not charged against this defendant by the indictment. Nor, do we believe, that the indictment is susceptible of amendment by information in lieu thereof.

Accordingly, the defendant's supplementary motion to dismiss the indictment and quash proceedings is by the court sustained on the grounds herein stated.

It Is Therefore Ordered and Adjudged that the indictment herein against the defendant, Robert Bolivar De Pugh, be and is hereby dismissed and the proceedings against him pursuant to said indictment be quashed.

S/ Charles Shangler,
Judge.

Dated this 9th day of March, 1967.